No. 87-853

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SIERRA PACIFIC POWER COMPANY,
Petitioner,

v.

THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEVADA,
Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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QUESTIONS PRESENTED

1. Is it appropriate to grant Certiorari to review a decision of a state court based on an issue of state law?

2. Is the requirement for notice and opportunity to be heard on an issue satisfied when that issue is fully briefed by the parties and discussed at oral argument?

PARTIES TO THE PROCEEDINGS

Petitioner has correctly set forth the parties to the proceeding.

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Respondent The Public Service Commission of Nevada (Commission) respectfully prays that the petition for writ of certiorari to review the judgment and opinion of the Nevada Supreme Court entered in the above-entitled proceeding on March 31, 1987, be denied.

OPINIONS BELOW

Petitioner Sierra Pacific Power Company has correctly set forth the appropriate judgments and opinions below.

JURISDICTION

The Commission opposes exercise of this Court's jurisdiction pursuant to 28 U.S.C. § 1257(3).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Commission does not object to Petitioner's citation to the Fourteenth Amendment to the United States Constitution. However, Nevada Revised Statutes § 704.100, cited by Petitioner, was amended by the 1987 Nevada Legislature. Nev. Rev. Stat. §§ 704.100(3) and (5), as set forth by Petitioner, were repealed. Thus, those sections of the Statutes Petitioner alleges precluded it from requesting recovery of annualized operating expenses are no longer in force and effect.

STATEMENT OF THE CASE

The genesis of this litigation is the Commission's decision on rate increase applications issued over 11 years ago on May 28, 1976 (Docket Nos. 574, 575, 576). The Commission authorized increases for Petitioner's electric, gas and water operations in Nevada but denied Petitioner's request to "annualize" certain operating expenses. Annualization is an accounting methodology utilized by some ratemaking agencies to project operating expenses for a 12-month period even

though such expenses were not actually experienced for a full test year.

Petitioner appealed the Commission's denial of recovery of annualized operating expenses. On April 11, 1979, the District court reversed the Commission, holding that Petitioner was entitled to recover annualized operating expenses.[1] The Commission appealed the District Court decision. The Nevada Supreme Court affirmed the decision of the District Court. Public Service Comm'n v. Southwest Gas Corp., 99 Nev. 268, 662 P.2d 624 (1983).

On April 30, 1984, approximately one year after Public Service Comm'n v. Southwest Gas, supra, Petitioner filed a petition with the Commission requesting recovery of annualized operating expenses for Docket Nos. 574, 575 and 576. On September 27, 1984, the Commission permitted Petitioner to impose a one year surcharge of $1,342,000, plus interest, on Petitioner's electric and gas tariffs to recoup the disallowed annualized operating expenses associated with Docket Nos. 574, 575 and 576.

On November 13, 1984, Petitioner filed an additional surcharge request of $14,119,855 plus

[1] Case No. 36626 (1st Dist. Ct., April 11, 1979).

carrying charges of approximately $3 million. This additional surcharge was intended to recover annualized operating expenses allegedly incurred as part of 13 unappealed rate cases decided between 1976 and 1982 while the appeal of Docket Nos. 574, 575 and 576 was pending.

As set forth by Petitioner in its Statement of the Case, the Commission denied the additional surcharge, the District Court reversed the Commission and the Nevada Supreme Court reversed the District Court, holding that Petitioner was not entitled to recover the additional surcharge. Public Service Comm'n v. Sierra Pacific Power Co., ___ Nev. ___, 734 P.2d 1245 (1987).

The Nevada Supreme Court's decision to deny relief was based on a detailed review of the complex factual history associated with the additional surcharge request. Upon such a review of the facts, the Court concluded, based on an analysis of pertinent state law, it was appropriate to invoke laches to bar relief.

REASONS FOR NOT GRANTING THE WRIT

1. The Nevada Supreme Court's Decision Was Based On An Issue Of State Law

The decision to deny the additional surcharge was based on the imposition of the equitable

doctrine of laches. As set forth by the Nevada Supreme Court:

> The Commission contends that the equitable doctrine of laches applies to Sierra's belated pursuit of the annualized expenses accruing throughout the period of litigation. We are constrained to agree. Laches will be invoked when an actual or presumable change of circumstances makes it inequitable to grant relief. Miller v. Walser, 42 Nev. 497, 517, 181 P. 437, 443 (1919). In Cooney v. Pedroli, 49 Nev. 55, 62-63, 235 P. 637, 640 (1925), we declared that "[w]henever the passage of time has brought in its train anything that works to the disadvantage of a party and makes it doubtful if equity can be done, relief will be denied." The history of the instant claim reveals significant inaction on the part of Sierra. The surcharge for annualized expenses approved by the district court had its genesis in a 1975 Commission decision. That decision was overturned in district court on April 11, 1979 and we affirmed the court's judgment in April, 1983. Sierra filed its new surcharge request with the PSC in November, 1984, six and one-half years after the first district court decision and twenty months after this court's affirmation. As previously noted, Sierra requested, and on occasion received, annualized operating expenses during the pendency of this litigation, yet did not appeal the denial of such expenses. Nor did it take any measures to give notice of its intent to recover annualized expenses which were never

presented to the PSC for consideration. Petition For Writ of Certiorari, App. 11a-12a.

It is settled law: a state court decision that relief was barred by laches will not be reviewed by this Court. Utley v. St. Petersburg, 292 U.S. 106, 111 (1934); Wood v. Chesborough, 228 U.S. 672, 677 (1913); Preston v. City of Chicago, 226 U.S. 447, 450 (1913).

The rationale behind this rule of law is that "[a] person may by his acts or omission to act waive a right which he might otherwise have under the Constitution of the United States as well as under a statute, and the question whether he has or has not lost such right by his failure to act or by his action, is not a federal one." Pierce v. Somerset Railway, 171 U.S. 641, 648 (1898).

2. The Decision To Invoke The Doctrine Of Laches Was Based On A Detailed Analysis Of The Facts

Petitioner alleges that Nev. Rev. Stat. § 704.100[2], as interpreted by the Commission in 1976 in Docket Nos. 863, 864 and 865, absolutely precluded Petitioner from even requesting recovery of annualized operating expenses while the appeal of Docket Nos. 574, 575 and 576 was pending. Once

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[2] As set forth supra, at 2, Nevada Revised Statutes § 704.100 was amended in 1987.

the appeal concluded in Petitioner's favor, Petitioner alleges it was entitled to recover annualized operating expenses for the period 1976-1982. According to Petitioner, denial of the additional surcharge is a deprivation of property in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

The Nevada Supreme Court scrutinized Petitioner's due process arguments and concluded, based on a review of the facts, that laches should bar relief. This Court has held that "[w]e do not grant a certiorari to review evidence and discuss specific facts." United States v. Johnson, 268 U.S. 220, 227 (1925). Moreover, these specific facts are not likely to recur due to the amendment of Nev. Rev. Stat. § 704.100.

The gravamen of Petitioner's request for relief was based on its assertion that it was absolutely precluded from requesting recovery of annualized operating expenses while the appeal of Docket Nos. 574, 575 and 576 was pending. Upon review of the facts, however, the Court correctly concluded that Petitioner did seek recovery of annualized operating expenses during the period in question:

> Notwithstanding the Commission's interpretation of the statute and Sierra's apparent acquiescence therein, both parties deviated therefrom in their future conduct. Subsequent to the dismissal of Dockets 863, 864 and 865 and during the pendency of the litigation, 1976-82, Sierra submitted several applications that included annualized operating expense as justification for the requested rate increase. Moreover, in selected instances the PSC granted such requests; in no instance was the entire application dismissed. Furthermore, Sierra attended rulemaking proceedings before the Commission. These culminated in a Commission regulation, promulgated September 27, 1982, allowing annualized operating expenses and revenues. Petition For Writ of Certiorari, App. 9a (footnotes omitted).

The Court's decision to deny relief was also based in part on Petitioner's failure to even give notice that it sought to impose an additional surcharge:

> Since Sierra continued to supplicate the PSC for annualized operating expenses on a selective basis during the period of litigation, and since the PSC entertained such applications without dismissal, it is apparent that Sierra could have applied for such expenses in each of the contested thirteen dockets and appealed from any denial by the PSC. In so doing, Sierra would have provided notice that it ultimately intended to recover its rejected expenses through means of a

> surcharge. At least the consuming public would have been technically apprised of Sierra's intent to impose an eventual surcharge on its customers. Petition For Writ of Certiorari, App. 11a.

Lastly, the Court found Petitioner's failure to challenge the Commission's interpretation of Nev. Rev. Stat. § 704.100, as set forth in Docket Nos. 863, 864 and 865, to be compelling:

> We also view as significant the failure of Sierra to seek review of the Commission's preclusive interpretation of NRS 704.100. Apparently content with the Commission's position, Sierra waited a period of years before seeking recovery of an increasingly large accrual of annualized expenses. In doing so, it assumed the risk that the Commission's interpretation would not survive the scrutiny of this court. Petition For Writ of Certiorari, App. 11a.

Petitioner asserts that it was precluded from challenging the Commission's interpretation of Nev. Rev. Stat. § 704.100. Petitioner cites Southwest Gas Corp. v. Public Service Comm'n, 92 Nev. 48, 546 P.2d 219 (1976) for the proposition that there was no right to appeal a dismissal of a rate increase application pursuant to Nev. Rev. Stat. § 704.100(5). Petitioner has simply ignored the crucial holding in this case.

In Southwest Gas Corp. v. Public Service Comm'n, supra, the utility filed a petition for a writ of mandamus, requesting that the Nevada Supreme Court require the Commission to reinstate a rate increase application dismissed pursuant to Nev. Rev. Stat. § 704.100(5). The Court held that because there was no right to appeal such a dismissal, the utility had no plain, speedy and adequate remedy in the ordinary course of law, and that mandamus was, therefore, appropriate. 92 Nev. at 56.

Obviously, Petitioner could have filed a petition for a writ of mandamus, challenging the Commission's dismissal of Docket Nos. 863, 864 and 865. However, Petitioner failed to seek a writ of mandamus, relying instead on its own interpretation of the effect of Nev. Rev. Stat. § 704.100. By failing to preserve its right to appeal, Petitioner simply assumed the risk that the ultimate interpretation by the Nevada Supreme Court would differ from its own. Brinkerhoff-Faris Trust and Savings Co. v. Hill, 281 U.S. 673, 682, fn. 9 (1930). The point is Petitioner did not take this issue to the Nevada Supreme Court until it was too late.

3. The Nevada Supreme Court Did Not Retroactively Overturn Settled State Law

Petitioner asserts the Nevada Supreme Court overturned a settled interpretation of state law, thereby denying Petitioner its constitutionally protected right to recover annualized operating expenses. Petitioner's assertion is based on an incorrect analysis of Southwest Gas v. Public Service Comm'n, supra.

In that case, the utility filed a Petition For Writ of Mandamus, requesting the Court reinstate a rate increase application dismissed by the Commission pursuant to Nev. Rev. Stat. § 704.100. The writ was issued, the Court holding that even though the application contained items previously disallowed by the Commission, new policy considerations were advanced to warrant reinstatement. The Court specifically found there was no pending litigation containing items of expense previously disallowed. 92 Nev. at 60.

Thus, the issue of whether a utility can apply for previously disallowed items that are the subject of pending litigation was not before the Court in Southwest Gas v. Public Service Comm'n, supra. In the case at bar, the Nevada Supreme Court correctly concluded that this issue was one of first impression:

> We have not had occasion to interpret the referenced provisions of NRS 704.100 within the context of the instant proceeding. In Southwest Gas Corp. v. Public Serv. Comm'n, 92 Nev. 48, 546 P.2d 219 (1976), we did conclude that NRS 704.100(3) did not prevent the Commission from considering expense issues which were not specifically under pending litigation. Id. at 58-59, 546 P.2d at 226. We now conclude, contrary to the position of the parties and the trial court, that subsection 4 of NRS 704.100 will permit the Commission to reconsider its prior rulings concerning items of expense or rate base even though they are the subject of pending litigation if the involved items are clearly identified in the application and "new facts or considerations of policy for each item are advanced in the application to justify a reversal of the Commission's prior decision." Petition For Writ of Certiorari, App. 8a.

Settled state law was not retroactively overturned. In Southwest Gas v. Public Service Comm'n, supra, the Court held that a utility could request items of expense that had been previously disallowed by the Commission. The issue of whether pending litigation would prohibit recovery of disallowed expenses was simply not before the Court since there was no pending litigation. In the case at bar, the Court held, consistent with Southwest Gas v. Public Service Comm'n, supra,

that a utility could request recovery of previously disallowed items regardless of whether they were subject to pending litigation. Therefore, those cases cited by Petitioner wherein settled state law was retroactively overturned are not relevant.

4. The Nevada Supreme Court Did Not Deprive Petitioner Of Notice And Opportunity To Be Heard

Petitioner alleges the Nevada Supreme Court concluded that Petitioner had requested annualized operating expenses without affording it notice and opportunity to be heard. Throughout the proceeding before the Nevada Supreme Court the Commission asserted that Petitioner had requested annualized operating expenses. This issue was addressed in the Commission's Motion For Stay of the District Court Order, and in the Opening and Reply Briefs. Moreover, the documents relied on by the Court for its factual determination that Petitioner had requested annualized operating expenses were either prepared by Petitioner or were orders drafted by the Commission as a result of fully litigated proceedings for rate increases filed by Petitioner. All of these documents were attached as exhibits to the Commission's appellate briefs. Furthermore, Petitioner responded to the

Commission's assertions in its Answering Brief and during oral argument. Petitioner's argument that it was not afforded notice and opportunity to be heard is without merit.

CONCLUSION

For the foregoing reasons, the Commission respectfully requests that the writ be denied.

Respectfully submitted,

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